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No. 31.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

GREENLIEF W. SIMPSON, APPELLANT,

v.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

LOUIS A. PRADT,
Assistant Attorney-General.

P. M. ASHFORD,
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STATEMENT.

On January 4, 1899, the United States, by and through Gen. Charles B. Eagan, Commissary-General of Subsistence, U. S. Army, entered into a contract with the appellant, whereby it was agreed that he should deliver "to the commissaries of the United States troops stationed at such posts and camps as are situated in the *interior* of the island of Cuba, at such prescribed hours on such days as, under the direction of their commanding officer they shall designate, such quantities of fresh beef * * * as from time to time they may require." (Rec., p. 7.)

It was further provided that—

> VI. This contract shall be in force from the 5th day of January, 1899, to the 30th day of June, 1899, inclusive, *or such less time for any post* as the Commissary-General of Subsistence, United States Army, may direct. (Rec., p. 8.)

During the period covered by the contract there were subsisting contracts between the United States and Swift & Co., of Chicago, Ill., whereby Swift & Co. agreed to "furnish the United States for the use of the Army of the United States such quantities of refrigerated, chilled, or frozen beef in bulk *delivered at points on the seacoast of the island of Cuba* occupied by the Army of the United States as shall from time to time be called for by the Acting Commissary-General of Subsistence of the United States Army." (Rec., pp. 10, 20.)

These contracts with Swift & Co. further provided that said company should erect refrigerating buildings "as near the point of transfer as the commanding general may designate, at which ships carrying the refrigerated meats shall land for the discharge of said shipments." (Rec., p. 21.)

Also that the United States should furnish army transports for the purpose of carrying the refrigerated beef from the United States to Cuba. (Rec., p. 20.)

In the month of December, 1898, a refrigerating building and apparatus was located at Los Quemados, a point about 7 miles from the city of Habana, by Swift & Co., in accordance with the provisions of the contract above referred to, and was completed and

ready for the reception of beef about the 1st of January, 1899. (Rec. p. 11.)

It so happened in the course of events, that the United States was not at all times able to furnish transportation for refrigerated beef ordered from Swift & Co. Consequently, there occurred periods during the winter and spring of 1899 when the supply of refrigerated beef at Habana or Los Quemados failed. At such times the chief commissary officer at Habana went into the market and purchased beef freshly slaughtered on the island of Cuba for issue to the troops. The appellant, on January 26, 1899, protested to the chief commissary and also to the Commissary-General at Washington against the purchase of beef for issue to the troops on the island of Cuba from persons other than himself and Swift & Co., it being contended by said appellant, then as now, that the two contracts, the one with appellant and the one with Swift & Co., were intended to provide for the furnishing of all the beef used by the United States troops on the island of Cuba.

As the result of appellant's protest and the negotiations and correspondence which followed with reference thereto, the appellant was, on February 21, 1899, informed that thereafter he would be called upon to furnish fresh beef under his contract whenever Swift & Co. were unable to furnish fresh beef under their contract.

Under this arrangement, appellant furnished beef at Los Quemados during the first thirteen or fourteen days of March, 1899, and was paid therefor the price named in his contract.

At about this time a member of the corporation of Swift & Co. appeared in Habana, and upon discovering that freshly slaughtered beef was being furnished at Los Quemados, which was, for the purposes of the contract between the United States and Swift & Co., a *seacoast point*, entered a protest with the chief commissary of the United States at Habana, and asked to be permitted to furnish freshly slaughtered but chilled and frozen beef for issue to the troops at Los Quemados and adjacent points, insisting and contending that the failure of the supply of refrigerated beef for issue at said point was due to the inability of the United States to furnish transportation from the United States to the island of Cuba, and that in all fairness and justice the United States should permit Swift & Co. to substitute beef freshly slaughtered on the island of Cuba, but chilled or frozen in their refrigerator plant at Los Quemados, in lieu of refrigerated beef from the United States, whenever and so long as transportation for refrigerated beef failed. After due consideration of this protest and proposition of Swift & Co., it was decided to discontinue the acceptance of beef from the appellant for issue from Los Quemados from and after March 14, 1899, and the appellant was notified in writing of such decision. Thereafter until the 30th day of June, 1899, and even subsequent thereto, a considerable quantity of beef freshly slaughtered on the island of Cuba and chilled or refrigerated in the plant at Los Quemados was furnished by Swift & Co. (See Finding X, Rec., pp. 12, 13, and 14.)

In passing it is proper to state that the statement in finding 9 (p. 11): "But the refrigerator (meaning the refrigerator at Los Quemados) was never used by the commissary or by Swift & Co. as a storage for beef slaughtered and dressed in the United States and brought to Cuba by Swift & Co. under their contract with the defendants," is erroneous. The finding quoted is not important and has no apparent bearing upon the issue involved in this case; however, it seems proper to say that a case is pending in the Court of Claims by Swift & Co. for alleged balances due for refrigerated beef received at Habana and stored in said refrigerating plant during the period referred to, and it is proper further to state that the reports of the War Department and the testimony taken in said case leave no doubt that at least two cargoes of beef and other fresh meat were received and stored in said refrigerator during said period. The two cargoes which were actually received are referred to by the appellant in his telegram of February 11, 1899, a copy of which is set out in finding 10 (Rec., p. 13).

The plaintiff's claim embraced profits upon all beef furnished at Los Quemados by others than himself from January 10, 1899, to June 30, 1899, which profits the court found would have been $31,439.30; or, if claimant's contract was lawfully annulled May 19, 1899, that the amount would be $29,398.42. It also embraced a claim for profits upon beef other than refrigerated beef shipped from the United States furnished to the posts of Habana and Matanzas by others

than the claimant, which profits the court found would have aggregated the sum of $27,356.96.

The court found against the entire claim, dismissing the petition. From that decision the claimant took this appeal.

ARGUMENT.

The claim of appellant was rested in the Court of Claims, as it is here, upon two propositions: First, the general contention that under his contract the claimant was entitled to supply, for the use of the United States troops in the island of Cuba, all the fresh beef needed by them except such refrigerated beef shipped from the United States as might be supplied by Swift & Co., under their contract, for the use of the troops at seacoast points. This proposition covers the claim for fresh-slaughtered beef furnished to the seacoast points of Habana and Matanzas by others than the claimant and refrigerated beef furnished by Swift & Co. to the same points, but from animals slaughtered by them upon the island.

The second proposition is that, as to Los Quemados, it was a post or camp situated in the interior of the island, and therefore, under his contract, the claimant was entitled to furnish, for the use of the troops there stationed, all of the fresh beef required for their use; and that not only the purchase of fresh slaughtered beef for the use of said troops from others than himself, but also the purchase of refrigerated beef from Swift & Co. for use at said point, was a violation of his contract. Both of these propositions relate to the claim for beef supplied at Los Quemados by others than the claimant.

The Court of Claims did not seem to consider that these propositions deserved discussion, but dismissed the petition without filing an opinion. This action, we contend, was just and well founded.

THE CLAIMANT'S FIRST PROPOSITION.

Counsel for appellant do not contend in support of their first proposition that there is anything in the language of the claimant's contract to bear out the same, but that in the light of the contracts of the Government with Swift & Co. and other surrounding circumstances such was the intent and purpose of the claimant's contract; that is to say, stated with precision, the proposition is: That the provision in claimant's contract, *that he should deliver to the commissaries of the United States troops stationed at posts and camps in the interior of Cuba, at such times as said commissaries should designate, such quantities of fresh beef, fit for immediate use, as said commissaries might from time to time require*, should be held to have the same force and effect as though it read *that the claimant should deliver all fresh beef needed for the use of the United States troops in the island of Cuba, whether stationed at interior or seacoast points, except such refrigerated beef shipped from the United States as might be supplied by Swift & Co. under their contracts with the United States for the use of troops at seacoast points only.* This is enlargement with a vengeance. This is making the cloud "backed like a camel" to look "very like a whale," without winking.

It does not seem to be a proposition capable of any serious discussion, and indeed counsel for appellant

have attempted none, but practically rest it upon the facts that Commissary-General Eagan informed the claimant prior to entering into the contract that such was the purpose and intent of the War Department; that the claimant was allowed at various times by the Commissary-General to supply various seacoast points with fresh beef, and that Commissary Smith, in notifying claimant of the order to this effect, used the language "under your contract;" also upon the language of the contracts with Swift & Co. To be sure it is stated in appellant's brief on page 29 that—

> The court below has expressly found that it was the purpose and intention of defendant, and so communicated to claimant, to cover the *entire* beef supply in Cuba, both *interior* and *seacoast*, by the two contracts, Swift & Co. and Simpson, and that when the former did not or could not supply the beef, the latter should. (Rec., p. 15.)

But this assertion proceeds from either misapprehension or inadvertence, for, by reference to finding 12, it will be seen that the court makes no such finding, but merely finds that, as above stated, Commissary-General Egan so stated to the claimant prior to entering into his contract. But the obvious answer to this is that though this may have been Commissary-General Egan's clear understanding and purpose before entering into the contract with the claimant, certainly both he and the claimant failed utterly to put into the contract any apt language giving expression to such purpose. On the contrary, they selected language explic-

itly confining the operations of the contract to fresh beef required by the various commissaries to be delivered to army posts or camps situated in the *interior* of the island. The contract being thus made, the claimant must stand by it as made.

> The written contract merged all previous negotiations, and is presumed, in law, to express the final understanding of the parties. If the contract did not express the true agreement, it was the claimant's folly to have signed it. The court can not be governed by any such outside considerations. (Brawley *v.* U. S., 96 U. S., 173; quoted with approval by Mr. Justice White in Simpson *v.* U. S., 172 U. S., 379.)

The only admissible rule of interpretation is for the court to gather the intent of the parties *from the words actually used in the contract* interpreted according to their plain and usual significance; and it is not permissible for the courts to go roaming round looking at "surrounding circumstances" and harkening to alleged conversations or transactions prior to or contemporaneous with the execution of the contract in order to gather the alleged intention of the parties. That would be to make a new contract for the parties and not to interpret the one which they did make. As is said in Parsons on Contracts (vol. 2, 8th ed., p. 495):

> But however important this inquiry (to ascertain the intention) may be, it is often insufficient to decide the whole question. The rule of law is not that the court will always construe a contract to mean what the parties to it meant, but rather that the court will give the contract the

> construction which will bring it as near to the actual meaning of the parties as the words they saw fit to employ, when properly construed, and the rules of law will permit.

Surely it needs no extended argument to demonstrate that neither the language nor the acts of subordinate commissaries of the Army could operate to determine the meaning of the contract to which they were in no sense parties. Their authority in the premises is thus stated by Mr. Justice Brown in Pine River Logging Co. *v.* U. S. (186 U. S., 291):

> With the contracts before them, they [officers of the United States] had but one duty, and that was to see that they were honestly and faithfully carried out according to their terms and letter.

As for the attempt to enlarge the scope of claimant's contract by reference to the contracts with Swift & Co., it is to be observed that there is no sort of privity between these contracts, and that neither contains the slightest reference to the other. Furthermore, there is nothing in the provisions of the contracts with Swift & Co. to bear out this contention. They do not provide that Swift & Co. should furnish refrigerated beef for the use of the United States soldiers stationed at seacoast points and for no other use, but that they should furnish such quantities of refrigerated beef as might, from time to time, be called for by the Acting Commissary-General of Subsistence of the United States Army, and deliver the same at points on

the seacoast of the island of Cuba occupied by the United States Army. There is nothing in this provision to bar the various commissaries from using the beef thus delivered for the purposes of troops at interior points, and, as already shown, claimant's contract contains no such inhibition. This argument for appellant then comes to this: That although his own contract does not in any sense contain the provision contended for by him, yet by considering his contract in the light of an independent contract with a stranger, which also contains no such provision, the missing provision may somehow be spelled out of the two contracts.

Finally, it is very significant that at no time during the controversies between the claimant and the commissary at Habana relative to the supply of beef at Quemados did the claimant base his demand upon the contention that Quemados was an interior post. What he insisted was, simply, that under his contract he had the right to furnish all the beef required for the troops at Los Quemados, the only exception being that furnished under contract with Swift & Co. To this the Acting Commissary-General replied: "Simpson's contract embraces posts and camps in the interior of island and not seacoast points." This decision was communicated by Commissary Smith to the claimant, and so far as the record shows was not then contested by him. (Rec., p. 12.)

THE LOS QUEMADOS CLAIM.

As for that part of the claim which relates to the beef supplied to the troops at Los Quemados by others than the claimant, we deny absolutely the proposition of appellant that he was entitled under his contract to furnish all the beef used by the troops at that post, but contend that the claimant is entitled to recover in any event only for such freshly slaughtered beef as was furnished to that post, and then only upon establishing that Los Quemados was a military post in the interior of the island of Cuba within the meaning of the contract, and also that he was required by the commissaries to furnish such beef but was not allowed to comply with such requirement, which facts, we insist, do not appear.

LOS QUEMADOS NOT AN INTERIOR POINT.

It seems very clear that the post of Los Quemados is not in any sense an interior point in the island of Cuba or, in other words, a post remote from the sea coast (see Finding II, Rec., p. 9), and certainly not within the meaning of that expression as used in the contract. This seems apparent from the geography of the island. Between pages 10 and 11 of the Record will be found the map showing the location of this point relatively to the city of Habana, and to the sea-coast. From this it will be seen that, practically speaking, Los Quemados is a suburb of the city of Habana. It was at all events, as found by the court, "a site selected some 8 or 9 miles distant from Habana (the

latter being the nearest seacoast point on the island to which the United States transports could go) for the location of the main body of the United States troops in the vicinity of Habana." In other words, the troops allotted to Habana were posted in and around that city, but chiefly at Quemados. And for all practical purposes all these troops may properly be said to have been stationed at Habana subject to be dealt with by the commissary on the same terms.

When the Army of the United States reached Habana it was midsummer. The reputation of the city proper as an abiding place for yellow fever was known to all the world. In the exercise of proper precaution and with due regard to the safety and good health of the Army, the troops were disposed about the city on the outlying hills along the seacoast. There was naturally the ever-present fear and danger of an outbreak of yellow fever in the city. It was therefore desired to have the Army located so that it might, in case of necessity, be isolated from the city. After fully canvassing the situation it was also and for the same reasons decided that the refrigerating building and plant to be erected by Swift & Co. under the terms and provisions of their contract with the United States should be located at some point outside of the city, so that in the event of an outbreak of yellow fever supplies and provisions might be stored therein without having to pass through the city, and might be issued therefrom without interference by any quarantine which might be made against the city. The point at

Los Quemados was manifestly the most advantageous to be found. It was 2½ miles from Playade Mariano and 7 miles from the city of Habana. A railroad connected it with both points.

Should all go well and no fever break out in the city of Habana, the transports bearing the refrigerated beef might be unloaded in the harbor of Habana and the beef transported thence by rail to Los Quemados. In order to secure this safety the United States agreed with Swift & Co. to bear the expense of transporting the beef from the harbor at Habana to Los Quemados. Again, in case of an outbreak of fever at Habana, the transports conveying refrigerated beef from the United States could anchor outside the harbor of Playade Marianao, where they might be unloaded on lighters and the beef be transported thence to the refrigerating plant at Los Quemados. Yellow fever did not break out in Habana, and, as stated in finding 9, no beef was landed at Playade Marianao or transported therefrom to Los Quemados. All of these facts are not found by the court as specifically as stated herein. However, they are in the nature of historical truth. They can be substantiated by the record in the case of Swift & Co., No. 22395, now pending in the Court of Claims.

A consideration of the contract of the United States with Swift & Co. contemporaneous with the contract with the claimant materially aids in determining this question. By that contract Swift & Co. were to furnish for the use of the Army of the United States, such quantities of refrigerated beef, delivered at the points

on the seacoast of the island of Cuba occupied by the Army of the United States, as should from time to time be called for by the Acting Commissary-General of Subsistence of the United States Army. It will be noted that there is no limitation in that contract of the use of this refrigerated beef to United States soldiers occupying seacoast points. The provision is only that the refrigerated beef be delivered at seacoast points. In the exercise of common sense and acting in the best interests of the service, the various commissaries would unquestionably appropriate the beef thus delivered for the uses of all United States troops in the island that could be conveniently supplied with the same whether occupying posts directly upon the seashore or, as in the case of Los Quemados, a short distance from the seacoast, and easily and conveniently reached by railroad. For all practical purposes, the troops at Los Quemados could be as easily supplied with the refrigerated beef delivered at the city of Habana as the troops in Habana itself, and indeed, as already stated, the refrigerator of Swift & Co. for the storage of such beef thus delivered, was located not at Habana, but at Los Quemados, thus practically uniting for commissary purposes in one post Habana and Los Quemados.

But adopting the claimant's contention, Colonel Smith, depot commissary at the port of Habana, who, according to finding 10 (Rec., p. 12), seems also to have acted as commissary for Los Quemados, would be warranted in using refrigerated beef for the troops in Habana, which beef would be stored in the refriger-

ator at Los Quemados, but would be precluded, under claimant's contract, from using the same beef for the use of the troops at Los Quemados itself.

True, the Secretary of War decided that the camp at Los Quemados was an interior post, but this decision was practically a mere abstraction, for contemporaneously he, in effect, directed the Commissary-General to annul claimant's contract, so far as relating to the post of Los Quemados, which was forthwith done. Moreover, with all due respect, this decision has no binding force whatever. Neither in law nor by the terms of the contract did the Secretary have any power whatever to determine with authority this or any other question growing out of this contract. It was, as we shall contend later on, a matter resting in the sound discretion of the commissary of the post, whose decision was exactly contrary to that of the Secretary, and which decision was concurred in by the Acting Commissary-General.

LOS QUEMADOS NEVER DESIGNATED BY THE COMMISSARY AT THAT POST AS A POINT TO BE SUPPLIED BY THE CLAIMANT UNDER HIS CONTRACT, AND CLAIMANT NOT REQUIRED TO FURNISH THE BEEF WHICH IS THE SUBJECT OF THIS ACTION.

We contend that even if Los Quemados were an interior army post, within the meaning of claimant's contract, nevertheless, by the terms of that contract, he was neither obligated nor had the right to deliver beef at that post except when required by the commissary of the post so to do.

The contention of counsel for the appellant is that the claimant's contract related to such beef as might be required or needed for the use of the troops at all interior posts, but the contract does not so read. It provides that "the claimant shall deliver *to the commissaries* * * * at such prescribed hours, on such days as under the direction of their commanding officers *they* shall designate, such quantities of fresh beef * * * as from time to time *they* may require."

From this it is perfectly clear that the quantity of beef which the claimant was obliged to and had the right to deliver at any interior point was to be such quantity as the commissary of that post might require of him from time to time. This is borne out by the advertisement of the Commissary-General, pursuant to which the claimant made his accepted proposal upon which his contract was issued. This proposal provided: "Deliveries to be in such quantities, at such times, and in such places as the commissaries of the troops to be supplied shall designate."

In this view of the meaning of the contract, it lodged with the commissary, who had charge of supplies of the troops at an interior point in the island, a reasonable and necessary discretion as to the determination of the character and mode of the beef supply of the troops at his post. In the exercise of that discretion he might decide to have them supplied with refrigerated beef from a near-by seacoast refrigerator, or with fresh beef secured from animals slaughtered close at hand, or he might determine that it was for the best

interests of the post to procure their beef from the claimant. In such case, upon his requirement of the claimant, the claimant would be obliged and it would be his right to deliver the quantities of beef thus required and at the place and times designated by the commissary.

Our contention is not, as stated by appellant's counsel, that this discretion could extend to the practical annulment of claimant's contract through the purchase of all freshly slaughtered beef required for the use of troops at interior posts from others than the claimant. We contend only for that which the facts in this case demand—namely: That Commissary Smith exercised a sound and reasonable discretion vested in him by the contract with the claimant when he decided that, for the use of troops at Quemados, which in his judgment was not an interior post, he might lawfully furnish beef, whether refrigerated or freshly slaughtered, obtained from others than the claimant.

It is endeavored on behalf of appellant to establish that an arbitrary and unconscionable rule was adopted by the Commissary Department in deciding whether or not to call upon the claimant for deliveries of beef, and that this rule was to purchase beef from other sources when it could be obtained cheaper and only from the claimant when it was cheaper to buy from him. In support of this contention is cited the telegram of Acting Commissary-General Davis, of March 11, 1899: "Quality being same, take Simpson's. Price lower." (Rec., p. 14.) That telegram, however,

in no sense bears out this contention of appellant. It related not to freshly slaughtered beef purchased from Swift, but to beef slaughtered on the island by Swift & Co., and there refrigerated by them. As to such beef the Commissary-General decided that it practically came within the terms of Swift & Co.'s contract for refrigerated beef, although refrigerated in Cuba instead of in the United States. This seems to be eminently reasonable. It certainly was refrigerated beef and it would seem to be within the province of the commissary to accept under the contract with Swift & Co. beef thus refrigerated if satisfactory in quality; and it is difficult to imagine on what grounds claimant has the right to contest that decision.

In the further exercise of his sound discretion the Commissary-General decided that he would furnish to the troops in Cuba satisfactory beef thus refrigerated by Swift & Co., instead of freshly slaughtered beef, because the price of the same was lower. This decision, we contend, was characterized by absolute good faith and was in no sense arbitrary.

In every possible aspect of this case, then, it is contended by the United States that the decision of the Court of Claims should be sustained upon this appeal.

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